IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Misc. Stay Application No.1747/2005
In
S.B. Civil Second Appeal No.371/2005

Zahoor Mihan S/o Shri Mohammed Sharif & Others
...defendant-appellants
Versus
Mst. Maimoona W/o Shri Nizamuddin & Another
...plaintiff-respondents

Date of Order ::: 19.12.2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri R.K. Mathur, Counsel for defendant-appellants
Shri M.C. Jain, Counsel for plaintiff-respondents
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By the Court:-

Heard learned counsel for the parties on the stay application under Order 41 Rule 5 read with Section 151 of the Code of Civil Procedure.

Learned counsel for the defendants-appellants submits that the second appeal has already been admitted, therefore, the eviction-decree passed against the defendants-appellants be stayed during the pendency of the second appeal, whereas the learned counsel for the plaintiff-respondents opposed the prayer of grant of interim stay order against the eviction-decree on the ground that both the courts below have decreed the suit for eviction filed by the plaintiff-respondent on the ground of personal bona-fide necessity of the rented shop and the plaintiffs

are in need of the shop immediately. In alternative, the learned counsel for the respondents contended that in case this court grants the stay order against the eviction-decree in favour of the appellants then at-least the mesne profit of the rented shop as per prevalent market rate of the monthly rent may be awarded during the pendency of this second appeal.

The Hon'ble Supreme Court in the case of **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705**, considered the jurisdiction of the appellate Court while passing order of stay under Order 41 Rule 5 of the C.P.C., and held that the appellate court has jurisdiction to put the applicant under Order 41 Rule 5 of the C.P.C., on such reasonable terms as would, in its opinion, reasonably compensate the decree-holder for loss occasioned by delay in execution of the decree by grant of stay, while passing the stay order in his favour, in the event of the appeal being dismissed. The Hon'ble Apex Court in the above referred case held as under :

> "19. To sum up, our conclusions are:
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> 1. While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would, in its opinion, reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the

appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.

2. In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (1) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.

3. The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date".

The Hon'ble Supreme Court again in **Anderson Wright & Company Vs. Amar Nath Roy, 2005 DNJ (SC) 562,**

while considering its earlier judgment in Atma Ram Properties (P) Limited's case (Supra) reiterated the same proposition of law.

The above referred Atma Ram Properties (P) Limited's case (Supra) has further been followed by three-Judges Bench of the Hon'ble Apex Court in the case of ***Achal Misra Vs. Rama Shanker Singh & Others (2005) 5 SCC 531*** and ***Crompton Greaves Limited Vs. State of Maharashtra (2005) 11 SCC 547***.

This Court in **Madan Bansal Vs. Ramnarayan Sharma, RLR 2006 (1) 733**, considered the similar point and observed as under:

> "..... the criteria for admission of the appeal are altogether different than what adopted at the time of hearing of the appeal for final disposal. Even if the appeal is admitted by the First Appellate Court being a statutory appeal or second appeal as substantial question of law arises then it does not mean that it will be allowed finally. Once appeal is admitted, then it is commonly known, that it goes for hearing in Due Course and due to long list of pending old appeals, it takes quite considerable long time in its final disposal. In such circumstances a decree-holder is not only deprived of getting the possession of the rented premises, but also deprived of the monthly rent or the

> mesne profit or compensation for use and occupation of the rented premises as per the market value of the shop or the prevalent rent of the premises. The order 41 Rule 5 of the CPC gives jurisdiction to the appellate court to pass interim stay staying the execution of the decree but the interim stay order is required to be passed reasonably and while doing so the interest of decree-holder is also required to be protected."

In view of the above referred decisions, it is clear that while passing the interim stay order against the eviction-decree, an order in respect of mesne profit or compensation for use and occupation of the disputed premises can be passed under Order 41 Rule 5 read with Section 151 of the CPC.

So far as amount of mesne profit is concerned, the learned counsel for the appellants contended that the appellants are poor persons, therefore, a reasonable amount of mesne profit may be awarded in the matter. He further contended that approximately Rupees three or four hundred may be fixed as monthly mesne profit.

The learned counsel for the respondents contended that the size of the rented shop is about 30-35 feet in depth and 10-12 feet in width. The shop was rented out at the rate of Rs.2/- per month about fifty years back and the rent of Rs.2/- was increased to Rs.12/- in the year 1963 and since then i.e. for

the last more than 43 years the appellants are paying the rent at the rate of Rs.12/- per month only. He contended that the shop is situated in Kafla Bazar, Tonk, which is prime location of the Tonk, which is a District Headquarters and if, at present, the said shop is rented out then it can fetch monthly rent at the rate of Rs.5000/-. Therefore, his contention is that the appellants be directed to pay mesne profit/rent at the rate of Rs.5000/- per month.

I have considered the submissions of learned counsel for both the parties as well as the facts and circumstances of the present case.

So far as passing of interim stay order is concerned, I am of the view that once the appeal is admitted the eviction-decree passed against the appellants should be stayed and accordingly I stay the decree of eviction passed against the defendant-appellants during the pendency of this second appeal on the following terms and conditions:-

> That the defendant-appellants shall deposit the arrears of monthly mesne profit till 30th of November, 2006, as per directions of the courts below, within a period of one month and shall further continue to pay/deposit the monthly mesne profit at the rate of Rs.3000/- (Rupees three thousand only) per

month, with effect from 1st of December, 2006 by 15th day of each succeeding month in the bank account of the plaintiff-respondents, the details of which will be furnished by the plaintiff-respondents within a period of two weeks to the defendant-appellants or their counsel. In case the details of the bank account are not furnished, then the defendant-appellants may deposit the amount, in question, in the lower court itself.

It is made clear that in case all the arrears of mesne profit/rent, as per the direction of both the courts below, are not deposited within a period of one month and the future mesne profit/rent, as directed above, is not deposited with effect from 1.12.2006, for consecutive two months, then it will be open for the plaintiff-respondents to get the decree, passed in their favour by both the courts below, executed even during the pendency of the second appeal.

The stay application accordingly stands disposed of.

(Narendra Kumar Jain) J.

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